

AUG 26 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 5991

DATE COMPLAINT FILED: 4/9/08

DATE OF NOTIFICATION: 4/14/08

LAST RESPONSE RECEIVED: 5/5/08

DATE ACTIVATED: 5/27/08

EXPIRATION OF SOL: 3/26/13

COMPLAINANT: Melanie Sloan, Executive Director
Citizens for Responsibility and Ethics in Washington

RESPONDENT: U.S. Term Limits, Inc.

RELEVANT STATUTES: 2 U.S.C. § 431(17)
2 U.S.C. § 434(g)(2)(A)
2 U.S.C. § 441b(a)
2 U.S.C. § 441d(d)(2)
11 C.F.R. § 100.16
11 C.F.R. § 100.22
11 C.F.R. § 109.10(c)
11 C.F.R. § 109.11
11 C.F.R. § 110.11(c)(4)
11 C.F.R. § 114.2(b)(2)
11 C.F.R. § 114.15(c)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter involves allegations that U.S. Term Limits, Inc. ("USTL"), a 501(c)(4) non-profit corporation, incurred expenditures to broadcast a television advertisement expressly advocating the senatorial candidacy of Bob Schaffer on Colorado television stations and over the Internet through its own website and the YouTube video sharing website, and failed to disclose the expenditures or use a proper disclaimer on the ads.

1 Considering the overall circumstances of the matter, as discussed below, we recommend
2 that the Commission exercise its prosecutorial discretion to dismiss this matter and close
3 the file.

4 **II. FACTUAL AND LEGAL ANALYSIS**

5 **A. Factual Background**

6 Bob Schaffer, a former three-term congressman, is a candidate for the U.S. Senate
7 from Colorado. Schaffer filed a Statement of Candidacy with the Commission on May 9,
8 2007. Schaffer currently serves on the Colorado State Board of Education and as
9 President of the Parental Alliance for Choice in Education, a non-profit corporation that
10 has promoted reform in Colorado's public education system. He previously served in the
11 Colorado state legislature.

12 USTL describes itself as the leading advocate of term limits for American
13 politicians. See <http://www.termlimits.org/about-us> (last visited 7/7/08). USTL has
14 praised Schaffer for abiding by a term limit pledge, and not running for a fourth term in
15 the House of Representatives. In March 2008, USTL aired a 30-second video
16 advertisement, titled "Thanks Bob Schaffer" on broadcast and cable TV in Colorado and
17 on its website in March 2008. See USTL's Response to the Complaint ("Response").
18 The ad states:

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1 Today, we have more charter schools thanks to Bob Schaffer.
2 Thanks, Bob! Thanks, Bob! Thanks, Bob! Thanks, Bob!
3 Thanks, Bob! We couldn't have done it without you. Thanks
4 for standing up for us. Even when it was really, really hard.
5 Bob does the right thing. Bob keeps his promises. Thanks,
6 Bob Schaffer, for giving my daughter a chance. Bob Schaffer
7 helped create the Colorado Charter School Act. Tell Bob to
8 keep giving us real education options. Thanks, Bob! Thanks,
9 Bob!

10
11 At the end of the ad, the words "Bob Schaffer" and "Real Education Options"
12 move across the screen, and a written disclaimer states: "Paid for by U.S. Term Limits.
13 U.S. Term Limits is responsible for the content of this advertising. Not authorized by any
14 candidate or candidate's committee. U.S. Term Limits does not endorse candidates for
15 public office." The organization's Internet address, termlimits.org, also appears at the top
16 of the screen.

17 According to USTL, the ad was created to thank Schaffer for his position on
18 charter schools. See Response. It also was reported, however, that USTL's president
19 stated that, though the organization has no position on charter schools, it recognizes that
20 charter schools was a "signature" issue for Schaffer, and that the ad recognized Shaffer
21 for honoring his prior term limit pledge. See Lynn Bartels, *"Thanks, Bob" ad spawns*
22 *spoof "Big oil" replaces 'charter schools' in Schaffer spot*, Rocky Mountain News, April
23 9, 2008. Although USTL did not reveal the cost of the advertisement in its response, a
24 media report suggests that the effort cost the group approximately \$470,000. *Id.*

25 On March 26, 2008, after having shown the ad on its own website, USTL directed
26 its vendor, Political Media, Inc. ("Political Media"), to also post the ad on the YouTube
27 website. Later that day, a Political Media employee named Theodora Blanchfield posted
28 the ad on YouTube's website along with a caption stating "Bob Schaffer for Senate

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1 video." The only difference between the original version of the ad and the version that
2 appeared on YouTube was this new caption. USTL claims that the caption linking the ad
3 to Schaffer's senate candidacy was added without its direction, permission, or
4 knowledge. USTL provided affidavits from Political Media President Larry Ward and
5 Blanchfield, who is no longer employed by Political Media, declaring that she added the
6 "Bob Schaffer for Senate video" caption without instructions or authorization from either
7 USTL or her supervisors at Political Media.

8 USTL claims that it was unaware of the "Bob Schaffer for Senate video" caption
9 appended to the ad on YouTube until April 9, 2008, when it was contacted by a journalist
10 inquiring about the complaint, which was filed that day. According to USTL, upon
11 discovering the existence of the caption, it immediately sought to remove the ad from
12 YouTube. USTL provided an April 16, 2006 screenshot copy of the YouTube web page
13 stating that "this account is closed." A review of the YouTube website shows that the ad,
14 now captioned "Thanks Bob – Bob Schaffer," is available on the website. See
15 <http://www.youtube.com> (last visited 7/7/08).

16 **B. Discussion**

17 Complainant alleges that the YouTube caption shows that the ad expressly
18 advocates Schaffer's candidacy for the U.S. Senate, and the expense for the ad constitutes
19 an undisclosed independent expenditure. Although not specifically alleged, given
20 USTL's status as an incorporated entity, an ad expressly advocating the election of a
21 federal candidate also could constitute a prohibited corporate expenditure.

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1. Independent Expenditure

An "independent expenditure" is an expenditure for a communication expressly advocating the election or defeat of a clearly identified candidate that is not coordinated with a candidate or a political party. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16. A person (other than a political committee) who makes an independent expenditure aggregating \$10,000 or more at anytime up to the 20th day before the date of an election is required to file a report describing the expenditure with the Commission within 48 hours. 2 U.S.C. § 434(g)(2)(A); 11 C.F.R. § 109.10(c). There is no allegation or information suggesting that the ad was coordinated with Schaffer, his campaign, or a political party committee. See 2 U.S.C. § 431(17) and 11 C.F.R. § 100.16. Therefore, if the ad expressly advocates Schaffer's election, the expense for the ad is an independent expenditure.

Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 249 (1986) ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature.").

The Commission's regulations further provide that express advocacy includes communications containing an "electoral portion" that is "unmistakable, unambiguous,

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1 and suggestive of only one meaning" and about which "reasonable minds could not differ
2 as to whether it encourages actions to elect or defeat" a candidate when taken as a whole
3 and with limited reference to external events, such as the proximity to the election. See
4 11 C.F.R. § 100.22(b). In its discussion of then-newly promulgated section 100.22, the
5 Commission stated that "communications discussing or commenting on a candidate's
6 character, qualifications or accomplishments are considered express advocacy under new
7 section 100.22(b) if, in context, they have no other reasonable meaning than to encourage
8 actions to elect or defeat the candidate in question." See 60 Fed. Reg. 35292, 35295 (July
9 6, 1995).

10 The U.S. Supreme Court recently held that "an ad is the functional equivalent of
11 express advocacy, and thus subject to the corporate ban on electioneering
12 communications, only if the ad is susceptible of no reasonable interpretation other than as
13 an appeal to vote for or against a specific candidate." See *FEC v. Wisconsin Right to*
14 *Life, Inc.*, 127 S.Ct. 2652, 2667 (2007) ("*WRIL*"). Although 11 C.F.R. § 100.22 was not
15 at issue in the matter, the Court described "indicia of express advocacy" to include the
16 "mention [of] an election, candidacy, political party, or challenger" or whether the
17 communication "take[s] a position on a candidate's character, qualifications, or fitness for
18 office." *Id.* The Commission subsequently incorporated the *WRIL* principles into its
19 regulations governing permissible uses of corporate and labor organization funds for
20 electioneering communications at 11 C.F.R. § 114.15. See *Final Rule on Electioneering*
21 *Communications*, 72 Fed. Reg. 72899, 72914 (Dec. 26, 2007).

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a. Original Television Ad

It does not appear that the original TV ad without the "Bob Schaffer for Senate video" caption, which did not air close to any federal election, would qualify as express advocacy under either 11 C.F.R. § 100.22(a) or (b). First, the TV ad does not appear to contain any of the "magic words" or their equivalent under 11 C.F.R. § 100.22(a). Second, although the ad contains positive references to Schaffer, it has no electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning. While the statements that "Bob does the right thing" and "Bob keeps his promises" present a positive position on Schaffer's character, qualifications, or fitness for office, the original TV ad highlights Schaffer's accomplishments on public education (as a former state legislator and current member of the State Board of Education) and his position on a public policy issue – availability of charter schools in Colorado. See 11 C.F.R. § 114.15(c)(2). In sum, though Schaffer had previously declared his candidacy before the ad aired, and despite the character reference, the original TV ad has a reasonable meaning other than to encourage Schaffer's election and therefore is not an independent expenditure subject to disclosure.

b. YouTube Posted Ad

In contrast to the original TV ad, the "Bob Schaffer for Senate video" captioned YouTube version of the ad contains one of the express advocacy phrases ("Smith for Congress") specified in 11 C.F.R. § 100.22(a) and constitutes express advocacy. Consequently, the costs of the YouTube version of the ad would be subject to disclosure as an independent expenditure. Though the actual expense of the YouTube version of the ad is uncertain at this time, it appears that any such expense would be minimal.

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1 Available information indicates that YouTube does not charge a fee to post a video (such
2 as the ad at issue) on its website, and posting a video on the YouTube website would
3 likely involve minimal expense since the posting is not technically complex.

4 USTL asserts that it should not have to disclose the disbursement and that no
5 enforcement action is warranted because it did not authorize Political Media to add the
6 "Schaffer for Senate video" caption on the YouTube ad. USTL asserts that the
7 Commission should dismiss this matter as it did in MUR 5919 (Rhode Islanders for Jobs
8 and Tax Relief, Inc.), where a corporate employee acting contrary to the corporation's
9 explicit instructions sent unauthorized corporate e-mails expressly advocating the
10 election of a candidate, and the corporation promptly retracted the e-mails and disciplined
11 the employee. See MUR 5919, Statement of Reasons dated September 27, 2007.

12 While USTL could be held responsible for the actions of its vendor under the
13 principles of agency law, we do not recommend that the Commission pursue further
14 enforcement action in this instance. The vendor admittedly acted without USTL's
15 authorization, and USTL took prompt remedial action when it learned of the express
16 advocacy. Notably, USTL's disclaimer in the ad states that it does not endorse
17 candidates, and Political Media should have known that the new caption was inconsistent
18 with USTL's stated purpose. Additionally, the Commission has not recently pursued
19 violations caused by confirmed inadvertent vendor error. See, e.g., MUR 5775R
20 (Deborah Pryce for Congress), Factual and Legal Analysis approved on October 25,
21 2007; and MUR 5580 (Alaska Democratic Party), First General Counsel's Report dated
22 August 24, 2005 and Commission Certification dated August 30, 2005. Therefore,
23 considering the circumstances, we recommend that the Commission dismiss the

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1 allegation that USTL failed to report an independent expenditure concerning the
2 YouTube ad at issue.

3 **2. Corporate Expenditure**

4 Based on USTL's status as an incorporated entity, the YouTube ad could also
5 constitute a corporate expenditure. Corporations are prohibited from making
6 expenditures (including independent expenditures) for communications to those outside
7 the restricted class expressly advocating the election or defeat of a clearly identified
8 candidate, with respect to an election to any political office, including any local, State, or
9 Federal office. See 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). Therefore, the expense for
10 the YouTube ad would be a prohibited corporate expenditure, unless USTL is a qualified
11 non-profit corporation ("QNC") that is permitted to make independent expenditures
12 under 11 C.F.R. § 114.10. See 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b)(2).

13 A QNC is a 501(c)(4) corporation that meets the following criteria: (1) its only
14 express purpose is the promotion of political ideas; (2) it does not engage in business
15 activities; (3) it has no shareholders or other persons who can make a claim on the
16 organization's assets or earnings; (4) it was not established by a business corporation or
17 labor organization and does not directly or indirectly accept donations of anything of
18 value from business corporations or labor organizations. See 11 C.F.R. § 114.10(c).

19 Although USTL had not registered with the Commission as a QNC, see 11 C.F.R.
20 § 114.10(e)(1), there were prior matters in which the Commission treated USTL as a
21 QNC eligible to make expenditures containing express advocacy. In 1995, the
22 Commission found reason to believe and admonished USTL for creating and distributing
23 communications (radio ads and news releases) that expressly advocated the election or

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1 defeat of federal candidates without disclosing the disbursements and including
2 appropriate disclaimers, in violation of 2 U.S.C. § 434(c) and 441d. See MURs 4203 and
3 3975. There is no information to indicate that there has been any change in the factors
4 that caused the Commission to previously treat USTL as a QNC. Therefore, we do not
5 view USTL's status any differently than the Commission previously did. Nonetheless, as
6 previously discussed, *supra*, the circumstances of this matter suggest that dismissal
7 would be appropriate, irrespective of whether the expense for the YouTube version of the
8 TV ad is an independent expenditure or a prohibited corporate expenditure.

9 **3. Disclaimer**

10 Complainant also alleges that the ad did not contain a complete disclaimer, which
11 is required for any communication that expressly advocates the election or defeat of a
12 clearly identified candidate. See 2 U.S.C. § 441d(a) and (d)(2); 11 C.F.R. §§ 109.11 and
13 110.11. However, it appears that the YouTube version of the ad may be exempted from
14 the disclaimer requirements under the Commission's regulations regarding Internet
15 communications, since it appears that USTL did not have to pay YouTube for posting the
16 ad on YouTube's website. The Commission's regulations specifically exclude Internet
17 communications from the definition of public communication, stating that "[t]he term
18 general public political advertising shall not include communications over the Internet,
19 except for communications placed for a fee on another person's Web site. See 11 C.F.R.
20 § 100.26. (emphasis added). As previously mentioned, the available information
21 indicates that USTL did not have to pay YouTube to place the video on its website.
22 Therefore, the video would fall within the Commission's exemption for unpaid Internet
23 communications. See 71 Fed. Reg. 18589 (April 12, 2006). Further, even if the Internet

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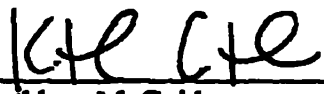
1 exemption is inapplicable, the Commission often has chosen not to pursue disclaimer
2 violations that result from confirmed inadvertent vendor error. *See, e.g.*, MUR 5775R
3 (Deborah Pryce for Congress), Factual and Legal Analysis approved on October 25,
4 2007; and MUR 5580 (Alaska Democratic Party), First General Counsel's Report dated
5 August 24, 2005 and Commission Certification dated August 30, 2005. Accordingly, we
6 recommend that the Commission dismiss the allegation that USTL failed to include an
7 appropriate disclaimer for the YouTube ad.

8 **III. RECOMMENDATIONS**

- 9 1. Dismiss the allegations that U.S. Term Limits, Inc. failed to disclose an
10 independent expenditure and to include an appropriate disclaimer for the
11 communication at issue.
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13 2. Approve the attached Factual and Legal Analysis.
14
15 3. Close the file.
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17 4. Approve the appropriate letters.
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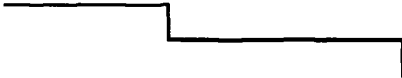
Thomasenia P. Duncan
General Counsel

25 8-25-08
26 _____
27 Date

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